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WILL THE SUPREME COURT STILL “SELDOM STRAY VERY FAR”? REGIME POLITICS IN A POLARIZED AMERICA

KEVIN J. MCMAHON*

I. INTRODUCTION

It had never happened before; never in the history of the presidency; never in the history of Supreme Court nominations. On April 7, 2017, the United States Senate confirmed a nominee for the High Court appointed by a President who had failed to win the popular vote with the support of a majority of senators who had garnered fewer votes—indeed far fewer votes—in their most recent elections than their colleagues in opposition. Specifically, the combined vote totals of the senators opposing Neil Gorsuch, President Donald Trump’s nominee for the Supreme Court, were nearly 22 million more than those in support of the newest Justice (76,507,374 to 54,557,602). Given the importance of the vote to the notion of democratic legitimacy, in this Article I consider the historical significance of a minority President appointing a “minority Justice.”

To be sure, as displayed in Table 1, Gorsuch was not the first Justice confirmed by a group of senators who had collected fewer votes in their most recent elections than those in opposition. That distinction belongs to Clarence Thomas, the George H. W. Bush appointee who stirred controversy with his strident conservatism—combined with the fact that he was selected to replace the liberal legend Thurgood Marshall—and due to Anita Hill’s accusations of sexual harassment.¹ But, of course, then Vice President Bush had captured the White House with a relatively comfortable victory over Massachusetts governor Michael Dukakis, winning forty states and 53.4 percent of the popular vote (a 7.72 percent margin). In securing confirmation to the High Court, Samuel Alito also did so with a majority of senators who had garnered fewer votes than those in opposition. And like Donald Trump, George W. Bush initially captured the presidency with

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1. On the Thomas confirmation, see MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* (2004), and JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994).

fewer popular votes than his Democratic opponent, Vice President Al Gore (and with the aid of the Supreme Court decision of *Bush v. Gore*²). However, with no vacancies occurring in his first term, Bush did not make an appointment to the Court as a minority President. And while his reelection victory in 2004 over Senator John Kerry was a narrow one, Bush did win thirty-one states and a majority of the popular vote (50.3 percent; a 2.46 percent margin). He appointed Alito the following year. (For purposes of comparison, I have also included in Table 1 the most closely contested vote for a nominee appointed by a Democratic president since the Thomas selection; namely, Barack Obama's choice of Elena Kagan in 2010.)

Table 1: The Senate Popular Vote & Recent Contested Confirmations

President	Popular Vote %	Nominee	Year	Senate Vote	Popular Vote of Senators Supporting	Popular Vote of Senators Opposing	Percentage Difference
George H.W. Bush	53.37%	Clarence Thomas	1991	52-48	43,173,687 48.33%	46,149,882 51.67%	-3.34%
George W. Bush	50.73%	Samuel Alito	2005	58-42	59,183,521 49.21%	61,064,342 50.78%	-1.57%
Barack Obama	52.86%	Elena Kagan	2010	63-37	84,684,830 66.52%	42,619,940 33.48%	33.04%
Donald Trump	45.93%	Neil Gorsuch	2017	54-45	56,693,408 41.63%	76,507,374 58.37%	-16.74%

So the Supreme Court now includes three Justices who were confirmed by a majority of senators who had received fewer votes than those in opposition, with the newest Justice appointed by a minority President. This observation led me to think about the connection between the popular vote in presidential elections and Supreme Court nominations and confir-

2. See generally *Bush v. Gore*, 531 U.S. 98 (2000).

mations, and to consider how these three recent confirmations fit within the historical record. More specifically, I explore three areas of interest in this Article. First, I review some of the foundational work of regime politics theory, a theory in political science that suggests that Supreme Court doctrine is a creation of the political regime that put the Justices in place. This thinking informed Robert McCloskey's work, and his 1960 conclusion that the Court has "seldom strayed very far from the mainstreams of American life."³ In doing so, I consider whether the current polarized state of American politics undermines the main assumptions of this literature. Second, I explore the entirety of Supreme Court appointments since the presidential election of 1824, the first election where states—at least most of them—chose electors based on the popular vote. I do so to examine whether there is a historical correlation between the popular vote and popular vote margin of a President and the ease or difficulty his Supreme Court nominees faced in the Senate confirmation process. Finally, I consider whether this recent development of "minority Justices" matters at all, given the fact that the framers of the Constitution purposely decided to provide each state with two senators, knowing that those senators from states with smaller populations would represent fewer—at times far fewer—citizens than those with larger ones.

II. THE ELECTORAL ASSUMPTIONS OF EARLY REGIME POLITICS THEORY

At its roots, regime politics theory considers the well-worn conclusion that the Supreme Court "follows the election returns." The origins of the theory date back to the 1950s when both traditional legal scholars and political scientists were struggling to understand the place of the Court's 1954 decision in *Brown v. Board of Education*⁴ in American democracy. Opposing the traditional "legalistic" view that the Court sits to protect minorities from majority tyranny, political scientist Robert Dahl argued in 1957 that in actuality the Court usually operated as an arm of the national governing alliances that historically dominated American politics. For Dahl, the Court is seldom in conflict with the political (majoritarian) branches, and usually "operates to confer legitimacy, not simply on the particular and parochial

3. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 225 (Sanford Levinson ed., 4th ed. 2005).

4. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *supplemented*, 349 U.S. 294 (1955).

policies of the dominant political alliance, but upon the basic patterns of behavior required for the operation of a democracy.”⁵

To reach this conclusion, Dahl relied on realignment theory of partisan change.⁶ While he never specifically mentioned realignment theory in his 1957 article, it is implied throughout. Its clearest articulation comes in his concluding comments:

National politics in the United States, as in other stable democracies, is dominated by relatively cohesive alliances that endure for long periods of time. One recalls the Jeffersonian alliance, the Jacksonian, the extraordinary long-lived Republican dominance of the post-Civil War years, and the New Deal alliance shaped by Franklin Roosevelt. Each is marked by a break with past policies, a period of intense struggle, followed by consolidation, and finally decay and disintegration of the alliance.

Except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance⁷

So for Dahl, the political alliances that develop after electoral realignments ensure the Court will not significantly alter the policy outcomes of democracy—at least not for long. Given the institutional weakness of the courts, the propensity of Supreme Court vacancies, and the President’s power to fill those vacancies with nominees whose political philosophies are not radically different from both his own and a majority of senators, it would be unlikely that the judiciary will, “for more than a few years at most, stand against any major alternatives sought by a lawmaking majority.”⁸ In other words, as political scientist Jonathan Casper summarized, since

[n]ational politics in this country is generally dominated by relatively *stable* alliances of political interests, the Supreme Court—whose members are socialized by the same forces as are others active in politics and whose membership is selected by representatives of these political interests—is itself typically a member of such stable coalitions.⁹

5. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 295 (1957).

6. On realignment theory, see generally WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* (1970), V.O. Key, Jr., *A Theory of Critical Elections*, 17 J. POL. 3 (1955); and JAMES SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* (1983).

7. Dahl, *supra* note 5, at 293.

8. *Id.* at 285.

9. Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 51–52 (1976); see also David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*,

In this sense, humorist Peter Finley Dunne's "Mr. Dooley" was correct when he quipped: "th' supreme coort follows th' iliction returns."

Three years after the publication of Dahl's article, Robert McCloskey advanced a similar line of argument, concluding that the Court has rarely "lagged far behind nor forged far ahead of America."¹⁰ While McCloskey did not offer a thorough explanation for the Court's historical alliance with the political branches, he seemingly agreed with Dahl by writing:

This is not to suggest that the historical Court has slavishly countered the public pulse, assessed the power relationships that confronted it, and shaped its decisions accordingly. The process in question is a good deal more subtle than that. We might come closer to the truth if we said that the judges have often agreed with the main current of public sentiment because they were themselves part of that current and not because they fear to disagree with it.¹¹

In the 1970s, yet another political scientist, Martin Shapiro, took this argument to another level; writing that successful judicial activism following the New Deal was a direct result of the election of 1932. For Shapiro, the Warren Court "received broad support because, a decade or two after the New Deal, it finally moved to incorporate service to the New Deal victors into constitutional law, just as Congress and the presidency earlier had incorporated such service into statutory law."¹² Thus, "the Supreme Court got away with its activism because it was activism on behalf of the winners not the losers of Americans politics."¹³ More than a decade later, he added: "The voting realignment of 1932 led to a realignment of constitutional law that was completed by 1942. The Republican Court [which] had served Republican clients . . . [was replaced] by the new Democratic Court [that] was united in its determination to end this service to Republicans."¹⁴

In reaching these conclusions, scholars advancing these lines of arguments typically depended on realignment theory and the reliability of the appointment process to explain the representative connection between the

1973 WIS. L. REV. 790; Richard Y. Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975); JOHN B. GATES, *THE SUPREME COURT AND PARTISAN REALIGNMENT: A MACRO- AND MICROLEVEL PERSPECTIVE* (1992); William Lasser, *The Supreme Court in Periods of Critical Realignment*, 47 J. POL. 1174 (1985).

10. McCLOSKEY, *supra* note 3, at 224.

11. *Id.*

12. Martin M. Shapiro, *The Supreme Court: From Warren to Burger*, in *THE NEW AMERICAN POLITICAL SYSTEM* 194 (Anthony King ed., 1978).

13. *Id.*

14. Martin Shapiro, *Chief Justice Rehnquist and the Future of the Supreme Court*, in *AN ESSENTIAL SAFEGUARD* 145 (D. Grier Stephenson, Jr. ed., 1991).

Court and the voting public—as Dahl did¹⁵—or have argued—as Shapiro did—that the political branches aren’t that democratic anyway, so it’s appropriate for the courts “to act when the legislatures won’t.”¹⁶ In support of the first of these arguments, scholars have pointed out that the Court rarely invalidates major congressional statutes; that it often supports the government’s position when the United States is a party in a case; and that court-curbing proposals introduced in response to controversial decisions seldom succeed in Congress. In support of the second, Shapiro, for example, considers congressional and presidential politics. With regard to the former, he writes: “[T]here is no reason to believe that the self-preservation demands of Congress are likely to correspond to the demands of the majority, or that each social interest is likely to receive that degree of attention which its numerical strength in the population might warrant.”¹⁷ And to the latter, he notes that the presidency “can hardly be understood in simplistic majoritarian terms.”¹⁸

With the publication of *The Least Dangerous Branch* in 1962, Alexander Bickel reshaped thinking about the Supreme Court’s position in American democracy, especially in the legal academy.¹⁹ In *The Least Dangerous Branch*, Bickel argued that judicial review created a “counter-majoritarian difficulty” for the democratic system of government in the United States.²⁰ The counter-majoritarian difficulty is actually two questions rolled into one phrase. The first is empirical: Does the Court act in a counter-majoritarian fashion—that is, consistently strike down legislation or executive orders passed or issued by democratically elected officials? The second question is a normative one: If the Court does issue decisions that can properly be described as counter-majoritarian, is it in accordance with an American conception of democracy?

15. See, for example, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND ATTITUDINAL MODEL* 332 (1993). They write: “[T]he displacement of the liberal Warren Court with increasingly conservative Burger and Rehnquist Courts did not result because of congruence with public sentiment. It resulted because Nixon, Reagan, and Bush populated the judiciary with persons in their own ideological image.” *Id.*

16. See MARTIN M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 240–41 (1964); MARTIN SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 17–21, 32 (1966) [hereinafter SHAPIRO, *FREEDOM OF SPEECH*]; see also SANDFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

17. SHAPIRO, *FREEDOM OF SPEECH*, *supra* note 16, at 21.

18. *Id.* at 22.

19. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (Yale Univ. Press 1986) (1962).

20. *Id.* at 16–22.

Political scientists like Dahl focused their sights on the first question, and argued that the counter-majoritarian force allegedly created by the Court was actually quite weak. In other words, independent judicial policy-making rarely takes place because it is “somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite.”²¹ For Dahl, except in those rare instances of transition, the second question was all but moot. In contrast, academic lawyers stressed the normative aspect of the counter-majoritarian difficulty, and by appealing to political theory, a number of them purported to have “solved” it.²² For his part, Dahl did not wish to expend his energy on “proving that, even if the Court consistently defends minorities against majorities, nonetheless it is a thoroughly ‘democratic’ institution.”²³ For him,

to affirm that the Court *ought* to act in this way is to deny that popular sovereignty and political equality *ought* to prevail in this country. . . . [N]o amount of tampering with democratic theory, can conceal the fact that a system in which the policy preferences of minorities prevail over majorities is at odds with the traditional criteria for distinguishing a democracy from other political systems.²⁴

In turn, Dahl was determined to show how democracy was viable when the Court, in applying vague provisions like the Due Process Clauses, makes judgments that shape policy. For him, if the Court “flagrantly opposes the major policies of the dominant alliance,”²⁵ it will seriously jeopardize its legitimacy. But again, that only happened on rare occasions because, as he concluded:

[T]he Court is almost powerless to affect the course of national policy. In the absence of substantial agreement within the alliance, an attempt by the Court to make national policy is likely to lead to disaster, as the *Dred Scott* decision and the early New Deal cases demonstrate. . . .

. . . .

. . . Thus, the Court is least effective against a current lawmaking majority—and evidently least inclined to act. It is most effective when it sets the bounds of policy for officials, agencies, state governments or

21. Dahl, *supra* note 5, at 291.

22. See, e.g., 1 BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

23. Dahl, *supra* note 5, at 283.

24. *Id.*

25. *Id.* at 293.

even regions, a task that has come to occupy a very large part of the Court's business.²⁶

For the same reasons the Court cannot for long operate in a counter-majoritarian fashion, new legal criteria can be incorporated into its decisions. That is, given the stability of the national political alliance and the reliability of the appointment process, new Justices may arrive at the Court with new legal ideas explicitly or implicitly approved by the President and the Senate. And "within somewhat narrow limits set by the basic policy goals of the dominant alliance, the Court *can* make national policy."²⁷ Except when it is supported by the alliance, however, Dahl argues the Court does not play a significant role in the national policy-making process.

In the 1990s, another group of scholars revisited this question of the connection between the democratically-elected branches of government and the courts. This exploration effectively began with the 1993 publication of Mark Graber's seminal article, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*.²⁸ There, Graber argued that instead of presenting a counter-majoritarian problem, judicial review is more likely to present, a "nonmajoritarian difficulty"—that is, "when the real controversy is between different [minority] members of the dominant national coalition, or 'the clashing majority difficulty' when the real controversy is between lawmaking majorities of different governing institutions."²⁹ Judicial activity in these times, then, cannot be adequately explained by exploring the counter-majoritarian difficulty since there is usually no clear majority on many of the most controversial issues of the day. As Graber explains:

[A]ll exercises of the judicial power do not have the same relationship to democratic values. Realistic theories of the judicial function, thus, must examine the extent to which particular instances of judicial review actually promote or retard deliberate policy-making, majoritarianism, and political accountability. In some instances, judicial review is clearly inconsistent with ordinary understandings of democratic majoritarianism.³⁰

Following Graber, numerous scholars added to the regime politics or "political regimes" analysis, providing examples of how politics and law interact to make policy on a variety of matters. While most have been empirical-based, showing on how politics works to construct law, democratic linkages are often apparent. For example, in my own work on the Nixon

26. *Id.* at 293–94.

27. *Id.*

28. Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993).

29. *Id.* at 37.

30. *Id.* at 72.

administration, I argue that not only did Nixon successfully use the powers of the presidency to shape the Court doctrinally, he used the Court issue as a means of attracting votes at the ballot box.³¹ While not a focus of that work, the majoritarianism link between successes in electoral politics and doctrinal shifts with the nation's highest tribunal is clear. Nevertheless, following Graber, regimes politics scholars have been less interested in the need to "prove" the legitimacy of the Court's action as Dahl set out to do.

Still, the recent shift in American politics does raise some interesting questions about judicial legitimacy in an age of polarized politics. After all, Dahl's and McCloskey's conclusions seemingly assume the presence of enduring political regimes that attain and hold office with decisive—even landslide—electoral victories. But what happens if the popular vote and the Electoral College results are out of alignment? Does it matter, for example, that the Democratic presidential nominee has won the popular vote in the six of the last seven presidential elections (from 2000 to 2016), yet Republican Presidents have appointed a majority of the sitting Justices? Given this recent trend in the popular/electoral vote divide, it seems reasonable to consider the possibility of the alternative to McCloskey's conclusions—of a Court out of line with America—and what it may mean for its politics and its law; indeed for the nation itself. Before considering that question, I explore the historical record of a President's overall popular vote and popular vote margin on the one hand, and the Senate's treatment of his High Court nominees on the other. I show that in one sense the current situation in which the Senate consistently contests confirmations is not unprecedented. At the same time, the confirmation of "minority Justices" is an entirely new development in American politics. Put simply, for much of American history, few nominees who faced significant opposition in the Senate became a justice.

III. SUPREME COURT JUSTICES AND THE HISTORICAL RARITY OF A CONTENTIOUS SENATE

In this section, I consider the extent to which there has been a relationship between a President's performance at the polls and the Senate's treatment of his Supreme Court nominees since the popular vote first mattered in the presidential election of 1824.³² To begin, consider Charts 1 and 2

31. *See generally* KEVIN J. McMAHON, *NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES* (2011).

32. I do not count certain nominations. More specifically, I treat the following four instances as single nominations: 1) if a President nominated the same jurist more than once, but the Senate did not act on any of those later nominations or did not act differently on them (i.e., President John Tyler's

below. Chart 1 shows three things: 1) the popular vote percentage of the successful presidential candidate from 1824 to 2016; 2) the popular vote percentage margin of the successful presidential candidate, again from 1824 to 2016; and 3) the percentage of senators opposing each Supreme Court nomination made from 1826 to 2017.³³ Chart 2 also shows the overall popular vote and the margin of the popular vote for the winner of the presidential elections from 1824 to 2016, but (compared to Chart 1) only shows the percentage of senators opposing each *successful* Supreme Court confirmation.

nominations of John Spencer, Reuben Walworth, and Edward King; 2) if the Senate did not act on a nomination, but did consider the same nominee when the same President re-nominated him again soon thereafter (i.e., William Hornblower, Pierce Butler, and the second John M. Harlan); 3) if the nomination was contingent on the success of another nomination (i.e., Homer Thornberry's nomination to fill Abe Fortas's associate seat pending Fortas's confirmation as Chief Justice, which failed); and 4) if a President withdrew a nomination to fill an associate position in order to appoint the same nominee to Chief Justice (i.e., John Roberts).

33. I treat voice votes for Senate confirmation as unanimous votes. While it is clear that some voice votes did not mean that all voting senators supported a particular nominee, in this Article I am focusing on nominations that attracted significant opposition (more than 25 percent of voting senators). It seems reasonable to conclude that those confirmed by voice vote did not attract this level of opposition. Moreover, since there is no historical record of the level of opposition for these votes, my only options were to exclude them entirely or treat them as unanimous. Given the number of voice votes over the period under consideration, the first option was hardly one at all. Therefore, I chose the admittedly problematic second one. Additionally, when the Senate did not have a floor vote on a nomination, I reasoned that at a minimum the number of senators in opposition was at least equal to the number necessary to filibuster that nomination. Therefore, in those cases, the percentage of senators opposed in all the charts is equal to the number of senators necessary to filibuster the nomination at the time the president made it.

Chart 1: Presidential Popular Vote and Supreme Court Nominations 1824–2017

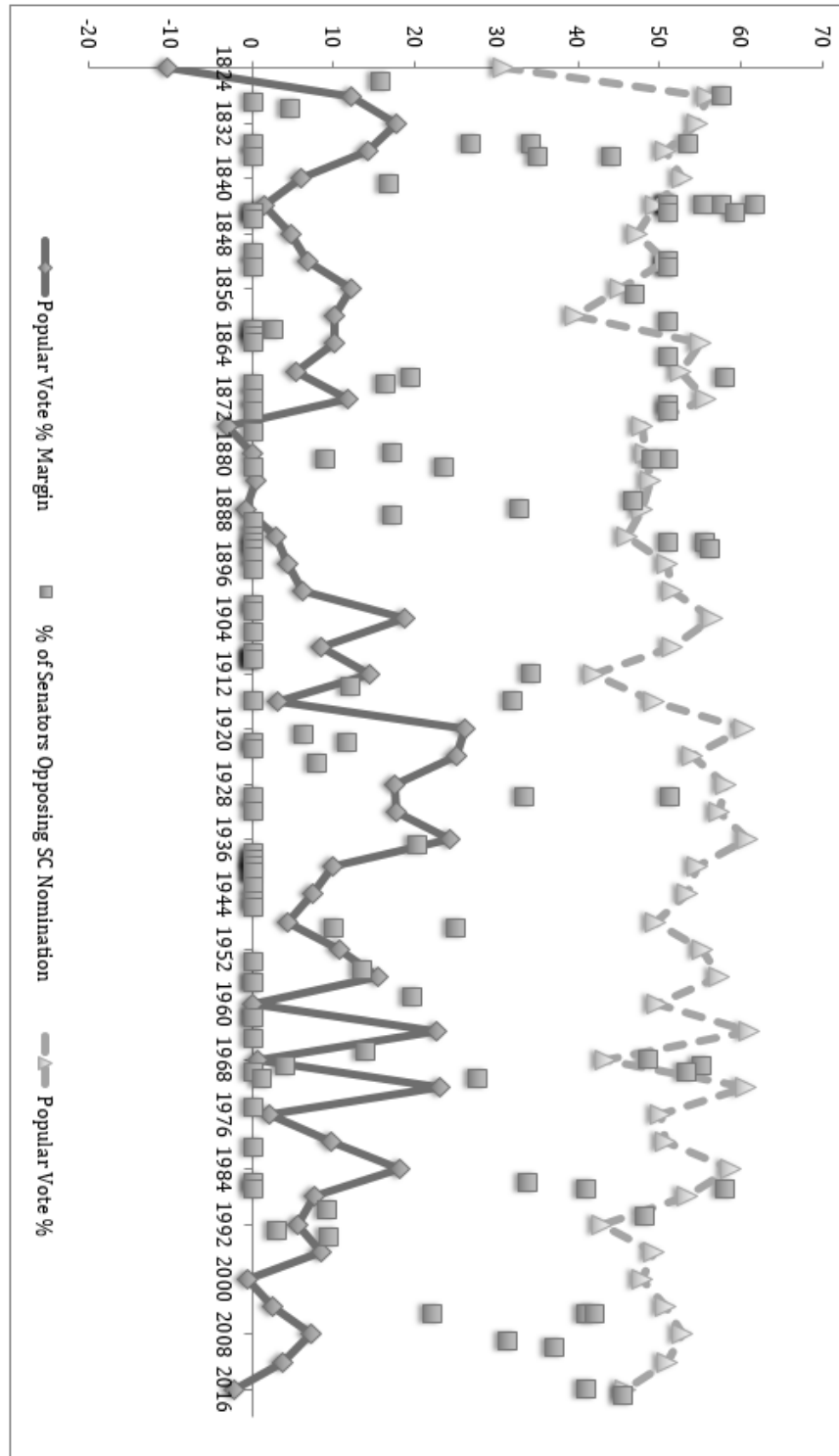
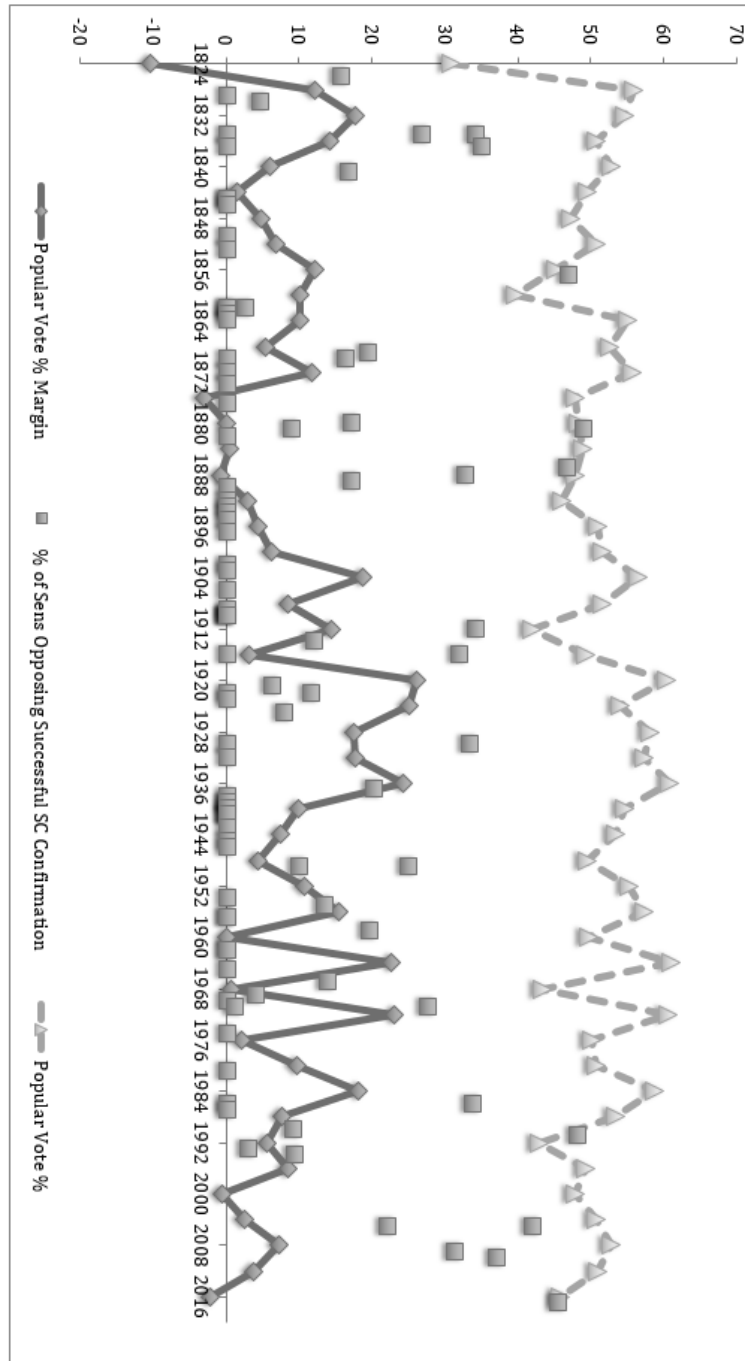


Chart 2: Presidential Popular Vote & Supreme Court Confirmations,
1824–2017



Four things are quite clear from the historical record. First, when a nominee was out of line with the interests of the Senate—whatever the reason—one of three events occurred: The Senate tabled the nomination (and took no further action), rejected the nominee, or essentially forced the President to withdraw the nomination in the face of a negative vote. (There were also two instances where the Senate confirmed a nominee, but he declined to serve on the Court.) Indeed, as detailed below, during long stretches of American history, few nominees who confronted conflict in the Senate reached the high bench. (I define a contested confirmation as one in which 25 percent of voting senators opposed the nomination.)³⁴ This reality is particularly significant for McCloskey's conclusions since it may help explain why the Court was often in alignment with the political branches of the federal government.

Second, as Dahl suggests, for much of American history, one political party was dominant at the national level and the Presidents representing those parties/regimes were able to secure easy confirmation of their selections for the High Court; typically with little or no opposition in the Senate. Yet, this was not always the case. As displayed in Charts 1 and 2, the most contentious periods in the Senate for Supreme Court nominees correlated with presidential weakness at the polls, both in terms of the overall popular vote and the margin of the popular vote. More specifically, the data show that during eras of tight presidential contexts, Court nominees faced more contentiousness in the Senate. To be sure, this reality did not necessarily extend to within the periods outlined below. In other words, this does not mean that every President who won a narrow victory was destined to witness his nominees for the Court face difficulty in the Senate. Nevertheless, elections did matter. Most importantly, there was a greater likelihood a nomination would face a contentious Senate during an election year or in the year after a narrow win by the appointing President, which I define as when the victor won less than 50 percent of the popular vote in a two-candidate contest and by less than a 5 percent margin. Third, nominations that occurred at the end of a partisan period, when the regime's authority

34. Elsewhere, I define a contested confirmation as one in which at least 20 percent of the voting senators oppose the nomination. Kevin J. McMahon, *Presidents, Political Regimes, and Contentious Supreme Court Nominations: A Historical Institutional Model*, 32 *LAW & SOC. INQUIRY* 919, 920 (2007); Kevin J. McMahon, *Confirming Chiefs: Ideology, Opportunity, and the Court's Center Chair*, in *THE CHIEF JUSTICE: APPOINTMENT AND INFLUENCE* 140 (David J. Danelski & Artemus Ward eds., 2016). However, both of those works focus only on nominations made after 1900. Given the contentiousness of the confirmation process during the nineteenth century and that a few of the votes in the twentieth century barely surpassed the 20 percent figure, I have raised the contentiousness bar to 25 percent in this analysis to better reflect the nature of opposition during the nearly two centuries of Supreme Court nominations under consideration in this Article.

was in steep decline, were more likely to be contested in the Senate. Finally, and least significantly, nominations made by lame duck Presidents, those in power after their successor had already won election, typically confronted uncertainty in the Senate. Notably, all of the lame-duck nominations occurred in the nineteenth century.

Table 2: Situations when Senate Contested Most Confirmations, 1826–1969

Situation	Nature of the Situation	Contested nominations, 1826-1969	Contested nominations, mid-1837-1969
1	Election Year	12 (37.5%)	9 (34.6%)
2	Year following a Close Election	7 (21.8%)	7 (26.9%)
3	End of a Partisan Era	5* (15.6%)	5* (19.2%)
4	Lame Duck Presidency	2** (6.3%)	0
	Exceptions	6 (18.8%)	5 (19.2%)
	Total	32	26

*These nominations are distinct from Situations 1 or 2.

** These nominations are distinct from Situations 1, 2 or 3.

In the following sections, I show that the vast majority of closely-contested successful confirmations or failed nominations in the nearly century and a half between the years of 1826 to 1969 occurred in one or more of these four situations: during an election year; in the year immediately following a close election; at the end of a partisan era; or, during the lame duck days of a presidency. In fact, as Table 2 shows, 81.3 percent—twenty-six of thirty-two—of contested nominations fit into one of these four categories. Moreover, if the contested nominations from the early presidencies of John Q. Adams and Andrew Jackson are excluded from the analysis, 80.1 percent—twenty-one of twenty-six—of the contested nominations made from mid-1837 to 1969 fit into the first three categories. Four of the five nominations that don't were made in the aftermath of the Civil War (during the presidencies of Andrew Johnson or Ulysses S. Grant). Finally, only seven of those twenty-six contested nominees won Senate confirmation. In other words, in nearly three-quarters of the cases (73.1 percent),

when a nominee was contested in the Senate during this time period, he did not become a Justice. This figure highlights the importance of Senate objections to Supreme Court nominees. While the President possessed the sole authority to make the selections for the high bench, the Senate's voice was nevertheless powerful, thereby enhancing the democratic legitimacy of the choices. This fact adds to the explanation of why, as Dahl and McCloskey suggest, the Court was often in alignment with the political branches.

A. Jacksonian Era

While Charts 1 and 2 essentially confirm Dahl's 1957 assumptions about the shifts in the Court's membership, I outline more nuances by separating the data into six historical periods. Charts 3 and 4 highlight the Jacksonian period between 1824 and 1860.

Chart 3: Presidential Popular Vote & Supreme Court Nominations, Jacksonian Era

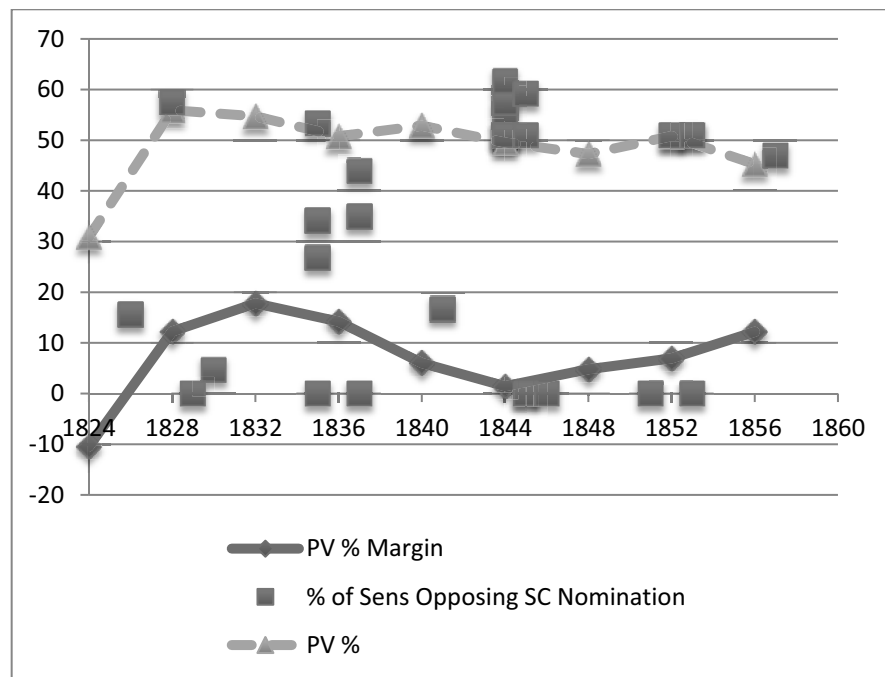
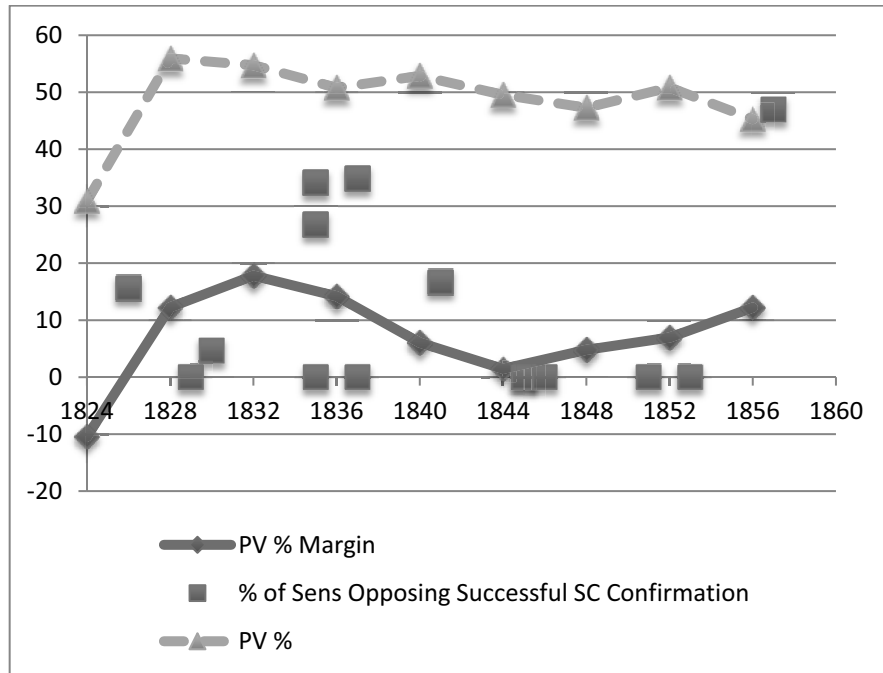


Chart 4: Presidential Popular Vote & Supreme Court Confirmations, Jacksonian Era



This period is easily the most distinct from the others with Presidents making numerous unsuccessful nominations, especially John Tyler. Nevertheless, the principles I outlined above hold. Of the sixteen nominees who confronted conflict in the Senate during the Jacksonian era, the Senate considered all but two in one or more of the situations outlined above in Table 2. More specially, it considered seven in an election year (situation 1) and another four in the year following a close election (situation 2). It considered another at the end of the era (situation 3) that was distinct from situations 1 and 2 (meaning it didn't also occur during one of those situations). Finally, two more of the contested nominees were appointed by a lame-duck President (situation 4), and during a time distinct from the first three situations.

To be sure, President Andrew Jackson had more difficulty than might have been expected given the size of his electoral victories, but the Senate ultimately confirmed all of his nominees.³⁵ Indeed, one of the two nomina-

35. Although as I note below, one—William Smith—declined to serve.

tions that did not fall into any of the four situations was Jackson's first nomination of Roger Taney in 1835. However, Jackson nominated Taney a year later for Chief Justice, and after a contested vote, the Senate confirmed him. Jackson's nominations are also unusual because he selected two men for the Court after the election of 1836. Both of those lame-duck nominations were for newly-created seats on the Court, and both were contested in the Senate.

It is also important to note that the President who had the greatest difficulty in securing confirmation for his nominees during this period was John Tyler, the first Vice President to assume the presidency due to the death of his predecessor. Tyler had been part of the Whig ticket with William Henry Harrison in 1840, but President Harrison died after only serving for thirty days in the White House. Tyler faced difficulty from the start as his detractors derisively referred to him as "His Accidency." Ultimately, Tyler was only able to put one jurist on the Court, even though two Justices died during his time in office. He nominated five men in total (two twice and one three times). All of these nominations took place in the election year of 1844 or in the final days of his presidency in 1845. Tyler broke with his party in 1841, and therefore was not the Whig candidate in 1844. Instead, his main adversary among the Whigs—Henry Clay—headed up the ticket. Clay lost to Democrat James K. Polk in a close race that year. Millard Fillmore confronted a similar problem as Tyler. Fillmore assumed the presidency after the death of Zachary Taylor. And like Tyler, he struggled to get his selections confirmed, succeeding in only one of four attempts (two as a lame duck President).

Finally, during this period, only four nominees joined the Court after a contested confirmation vote in the Senate. Those four Justices were: Roger Taney (1836 Senate vote); Philip Barbour (1836); John Catron (1837); and Nathan Clifford (1858). A divided Senate also confirmed William Smith in 1837, but he declined to serve. John Catron ultimately filled that seat, following his conflictual Senate confirmation. Notably, all of the Jackson's nominees who confronted conflict in the Senate did so near the end of his presidency. Indeed, the second Taney, Barbour, Smith, and Catron votes took place during the election year of 1836 (won by his Vice President, Martin Van Buren) or in the final days of Jackson's presidency in 1837. The contested confirmation of Clifford occurred in the final throes of the Jacksonian regime, after a weak President James Buchanan nominated him

to replace Benjamin Curtis, who had resigned from the Court to protest its decision in *Dred Scott*.³⁶

B. Civil War Period

The Civil War period witnessed a high rate of contested nominees. Indeed, the years between the end of the Ulysses S. Grant presidency in 1877 and the conclusion of the Civil War period with the inauguration of William McKinley in 1897 are perhaps the closest comparison to the politics of today with regard to Supreme Court nominations and confirmations. During these two decades, presidential election after presidential election resulted in narrow victories in which the winning candidate never received more than 50 percent of the popular vote, including two times when the victor lost the popular vote. In the Senate, High Court nominees confronted a confirmation gauntlet as seven of seventeen nominees (41 percent) were contested. But even before this time of close presidential contests, President Grant's choices for the Court were contested at an historical high rate (37 percent). Overall, during the Civil War period, there were ten contested nominations. Two each occurred during situations 1, 2, and 3 (for a total of six). A lame-duck President chose one of the contested nominees (situation 4), but that nomination was not distinct since it occurred in the year following a close election (situation 2). Four others were exceptions, meaning that they were not made in any of the four situations described above (Table 2). President Grant made three of those selections. His predecessor, Andrew Johnson, made the other.

36. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

Chart 5: Presidential Popular Vote & Supreme Court Nominations, Civil War Period

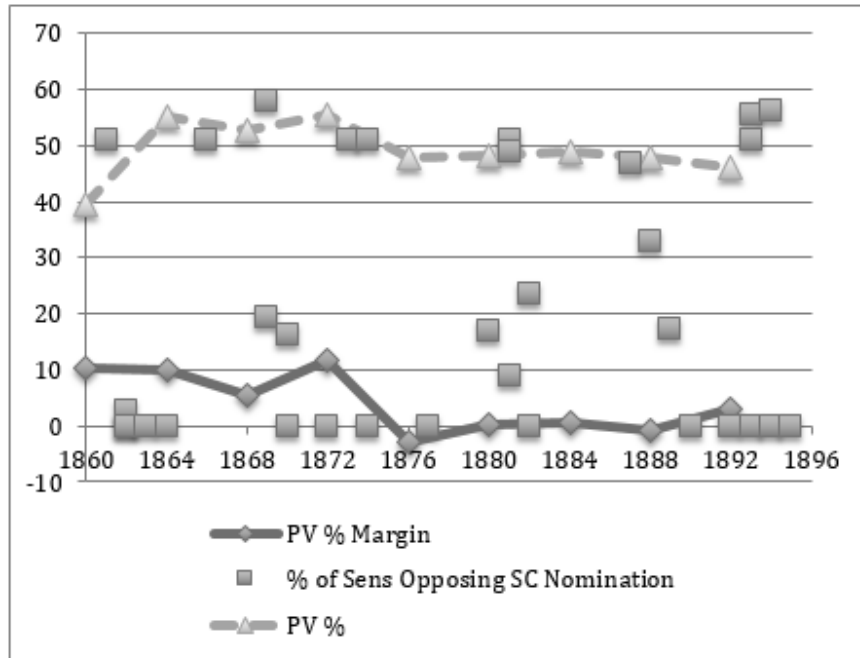
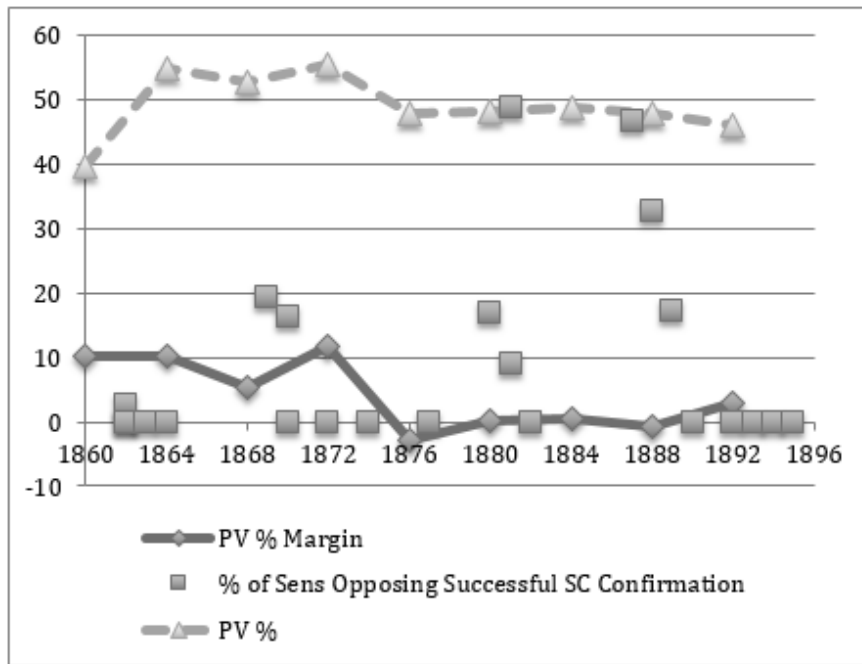


Chart 6: Presidential Popular Vote & Supreme Court Confirmations, Civil War Period



In entire Civil War period, only three jurists survived a contested confirmation battle to take a seat on the high bench. The others had no action taken on their nomination, were rejected by the Senate, were withdrawn, or in one case, declined to serve after being confirmed. The three contested Justices were: Stanley Matthews (1881), Lucius Lamar (1888), and Melville Fuller (1888). Rutherford B. Hayes first nominated Matthews as a lame-duck President in 1881, but the Senate took no action. Fellow Republican James Garfield, the victor of the close presidential election of 1880, re-nominated Matthews in the first days of his presidency (situation 2). Senators objected to the choice once again, but nevertheless, he was confirmed by the narrowest of margins, 24–23. The Senate confirmed President Grover Cleveland's choices of Lamar and Fuller in the election year of 1888 (situation 1), a contest Republican Benjamin Harrison won even though Cleveland, a Democrat, captured the popular vote.

C. Republican Era

With the election of the William McKinley in 1896 and the dominance of the Republican Party over the next thirty-six years, Supreme Court nominees faced a friendlier Senate in route to confirmation during this era. Only four nominees confronted a contentious confirmation process. Three won confirmation—Mahlon Pitney (1912), Louis Brandeis (1916), and Charles Evans Hughes (1930)—with approximately a third of the voting senators in opposition. The other—John J. Parker—suffered defeat in the Senate. As with the previous periods, the general principles I outlined above held true. Presidents Taft nominated Pitney in the last full year of his presidency; the same year he finished third in the presidential election of 1912 (situation 1). President Wilson chose Brandeis in the next presidential election year (situation 1), and while he won reelection, he did so by the narrowest margin of any victor during the Republican era (49.25 percent of the popular vote with a 3.14 percent margin). During this period of landslides, Wilson also won only 52.2 percent of the electoral vote. And if he lost the state of California—which he won by less than 4000 votes (.38 percent)—he would have lost the presidency. In all other elections during these years, the winning candidate captured at least 60 percent of the electoral vote, and more often than not, more than 70 percent of the Electoral College delegates. Notably, the Brandeis vote was the first contested confirmation in the re-constituted Senate. Beginning in 1913, after the ratification of the Seventeenth Amendment, senators were elected directly by the voters of their states rather than by state legislatures.

Chart 7: Presidential Popular Vote & Supreme Court Nominations, Republican Era

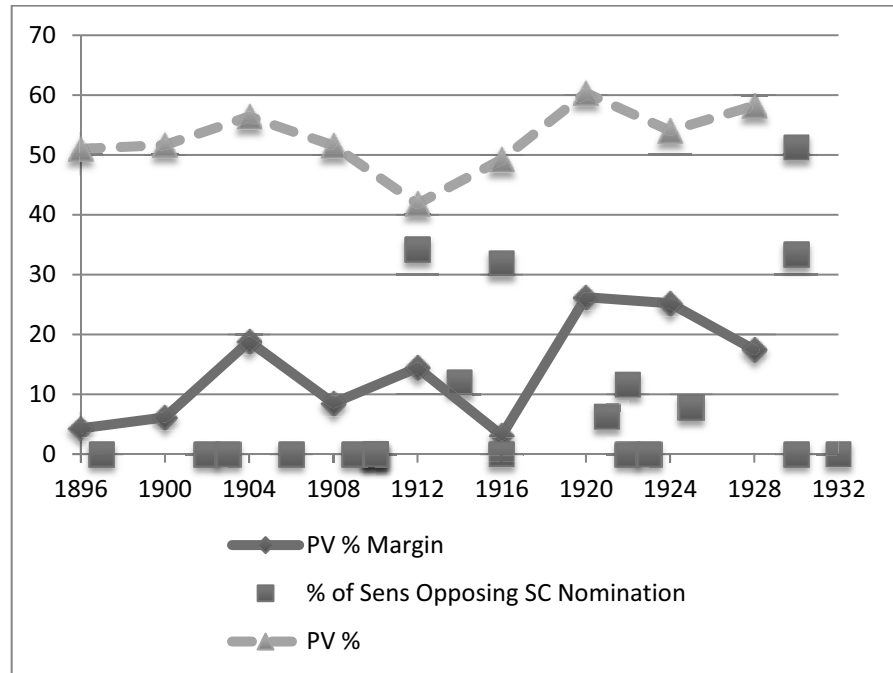
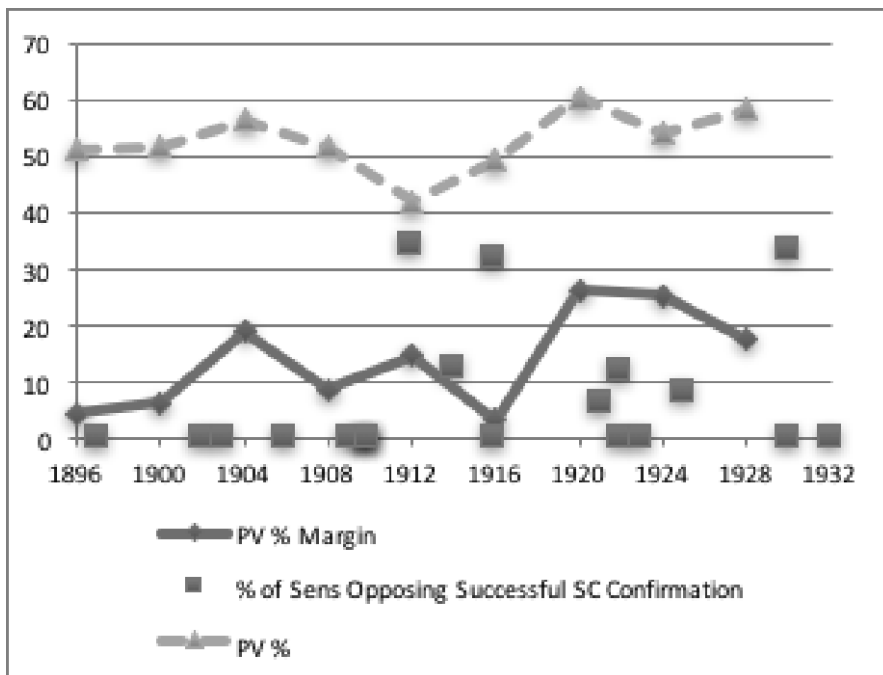


Chart 8: Presidential Popular Vote & Supreme Court Confirmations, Republican Era



President Herbert Hoover nominated Hughes and Parker at the end of that era (situation 3), and significantly, just as economic devastation of the Great Depression was beginning to take its toll on the nation. The Senate's rejection of Parker marked the brief interruption of an extended period of successful confirmations. It had been thirty-six years since the Senate had voted to deny another nominee a seat on the high bench, and it would be thirty-eight years before it would do so again.

D. New Deal Period

Just as the Republicans excelled in the elections of previous era, Democrats dominated the New Deal era. Wilson was the only Democrat elected during the Republican era—as a result of a divided GOP in 1912—and five-star general Dwight D. Eisenhower would be the only Republican to capture the White House during the New Deal period. Even more so than the previous era, landslides defined presidential elections in these years. In seven of the nine elections between 1932 and 1964, the victor won more than 80 percent of the electoral votes.

Chart 9: Presidential Popular Vote & Supreme Court Nominations, New Deal Period

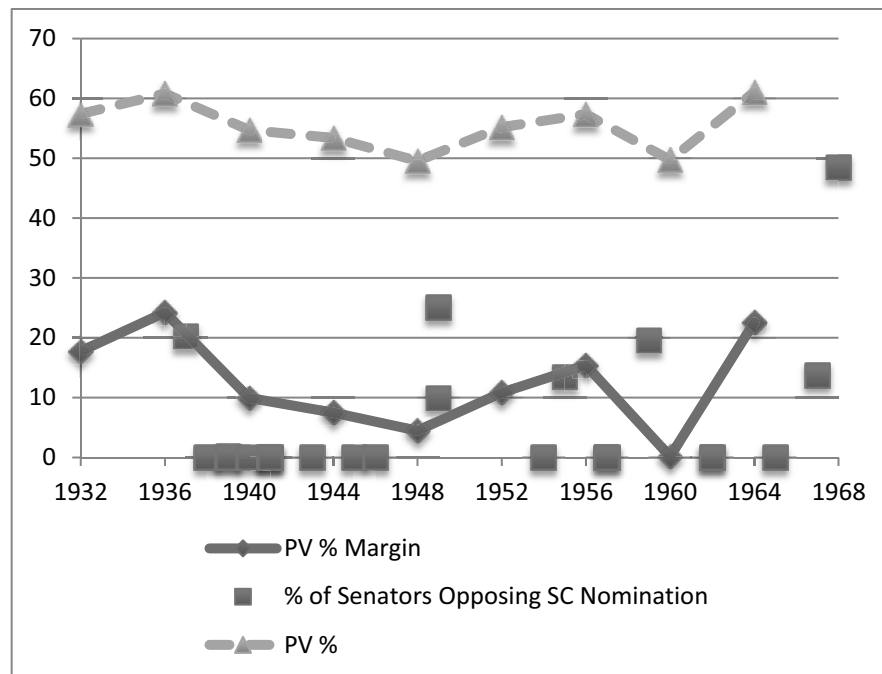
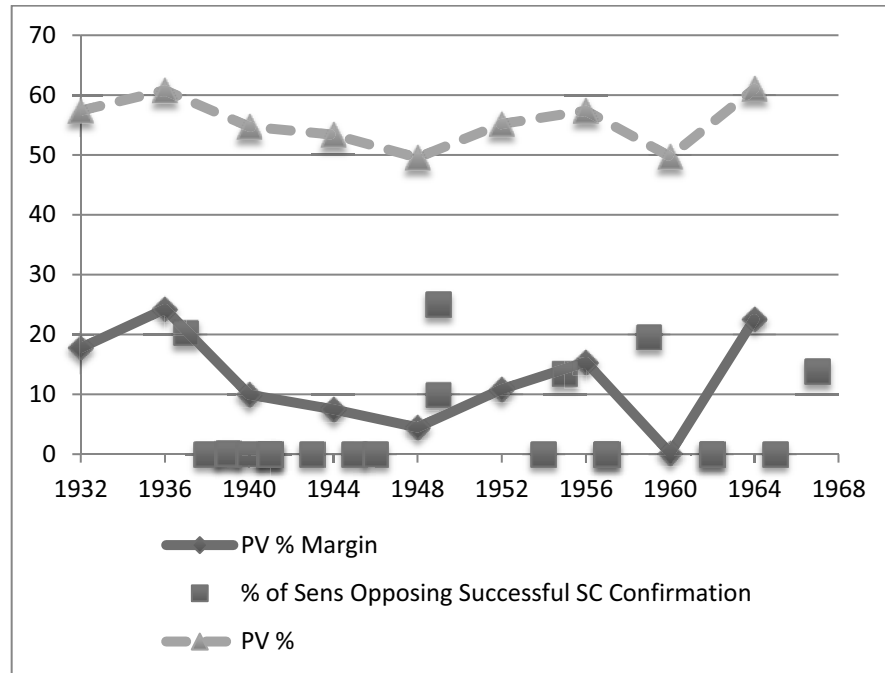


Chart 10: Presidential Popular Vote & Supreme Court Confirmations, New Deal Period



In turn, Supreme Court selections faced little hostility in the Senate. In fact, only one nominee garnered sufficient opposition to meet the definition of a contested nomination; that nominee was the last of the New Deal era. In the midst of the 1968 presidential race and in the aftermath of the assassination of Robert F. Kennedy, Chief Justice Earl Warren decided to retire in hopes of allowing President Lyndon B. Johnson (and not the likely Republican nominee Richard Nixon) to select his replacement. Johnson, against protests calling for the next President to choose the next Chief Justice, sought to elevate Associate Justice Abe Fortas to the Court's center chair. It did not go well. Senators used the Fortas hearings as a vehicle for critiquing the Court's recent groundbreaking doctrinal shifts, particularly in the area of criminal law.³⁷ With forty-three senators supporting a filibuster of the nomination and only forty-five calling for a vote, Fortas's chances to become chief died in the Senate on the first day of October 1968. LBJ

37. See generally LIVA BAKER, *Miranda: CRIME, LAW, AND POLITICS* (1983); LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* (1990); MCMAHON, *supra* note 31.

withdrew the nomination the next day. Of course, the Fortas defeat fits with the principles outlined above since it occurred in the final moments of the New Deal period (situation 3). The next era would not be so kind to candidates for the High Court.

E. Divided Government Era

In the nearly three-quarters of a century between 1894 and 1968, the Senate had rejected only one Supreme Court nominee. In the year and a half between October 1968 and April 1970, it would reject three: Fortas (1968), Clement Haynsworth (1969), and G. Harrold Carswell (1970). Later in this period, the Senate rejected another nominee (Robert Bork in 1987) and President Ronald Reagan withdrew another nomination (Douglas Ginsburg, also in 1987). Additionally, three successful nominations were contentious: William Rehnquist's appointment to be Associate Justice in 1971; Rehnquist's elevation to Chief in 1986; and Clarence Thomas's nomination to Associate in 1991. Three of the four defeats (Fortas belonging to the previous era) do not fit the patterns outlined above. Richard Nixon nominated both Haynsworth and Carswell soon after his election to the presidency. However, given the time it took for the Senate to consider and then reject Haynsworth, the Carswell defeat does not fall within the one-year period after a close election as defined above for situation 2. Additionally, both the Bork defeat and the Ginsburg withdrawal occurred in the autumn of 1987, before the election year of 1988 (and therefore outside the definition of situation 1). Finally, none of the contested confirmations occurred in any of the four situations outlined in Table 2.

Chart 11: Presidential Popular Vote & Supreme Court Nominations, Divided Government Era

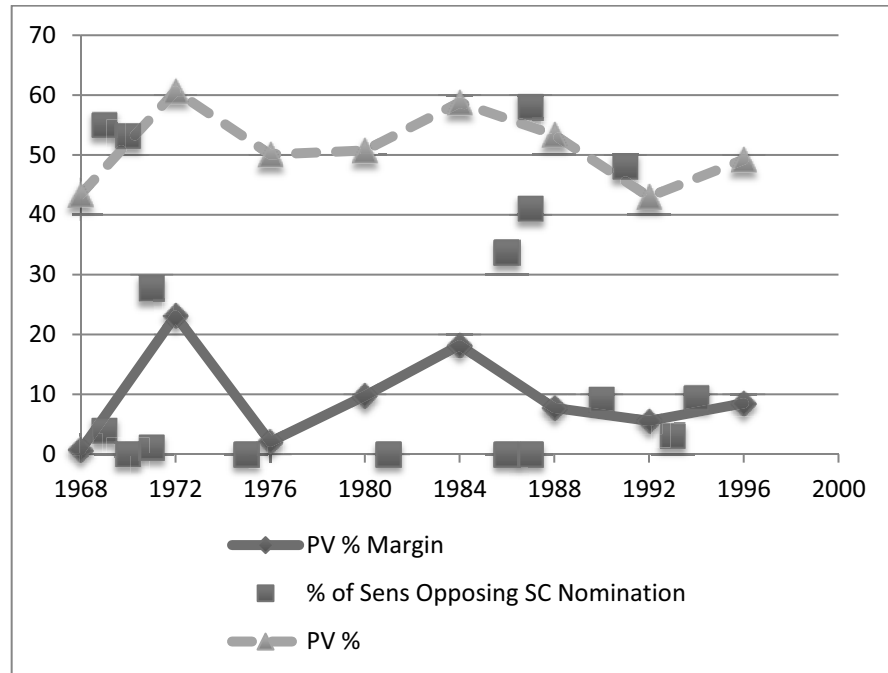
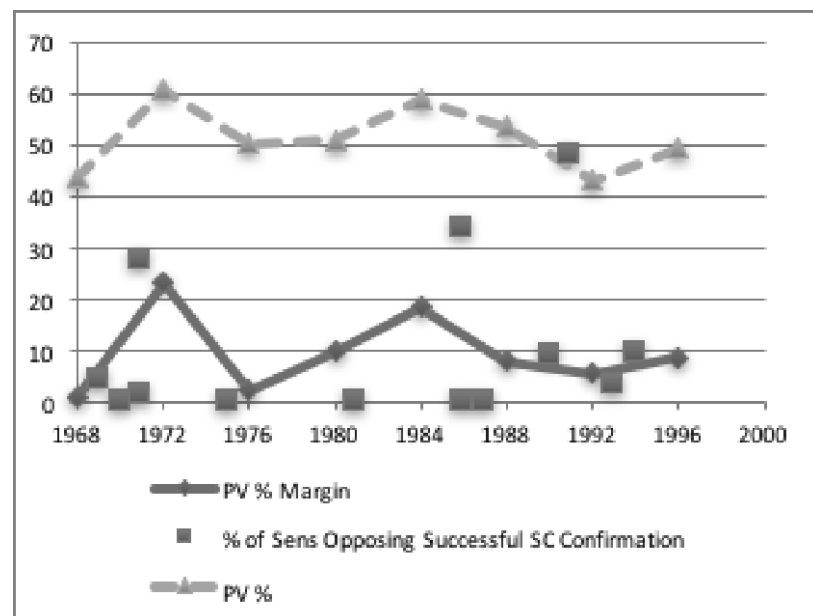


Chart 12: Presidential Popular Vote & Supreme Court Confirmations, Divided Government Era



Therefore, the principles that defined when the Senate would most likely contest a nominee for the Supreme Court for the better part of American history changed dramatically during this period, beginning early with Nixon's third choice for the Court. Also, as noted above, this period included the first nominee confirmed by a majority of senators who had garnered fewer votes in their most recent elections than those in opposition (Clarence Thomas). That trend would continue in the next period of political polarization.

F. Polarization Period

As noted earlier, in one sense, the current situation of a more polarized confirmation process is not unprecedented. Like today, past periods of confirmation conflict have come at times when the winning presidential candidate did not receive a majority of the overall vote in a two-candidate race, and did not win the popular vote by more than 5 percent.

Chart 13: Presidential Popular Vote & Supreme Court Nominations, Polarization Period

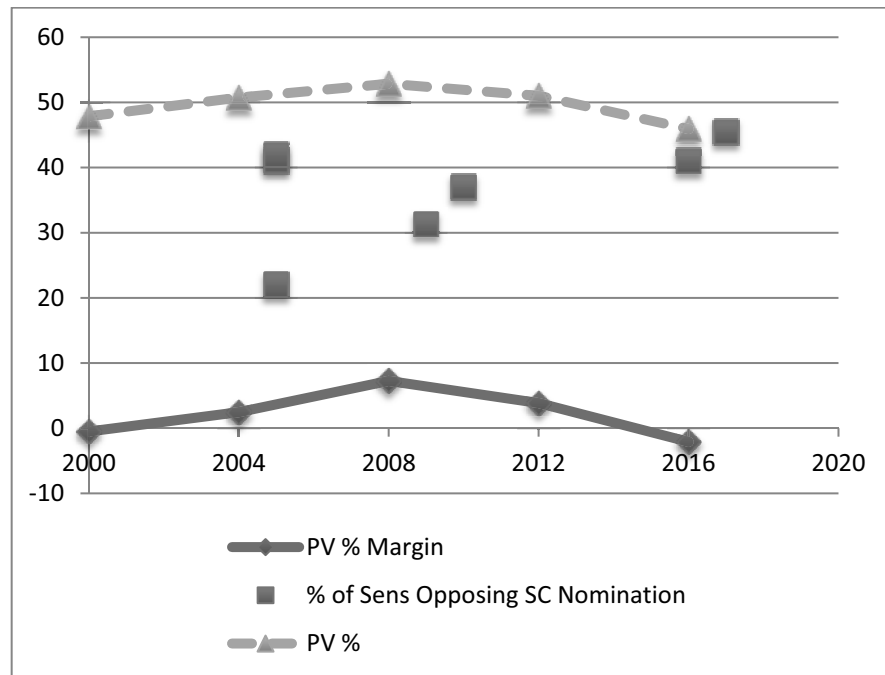
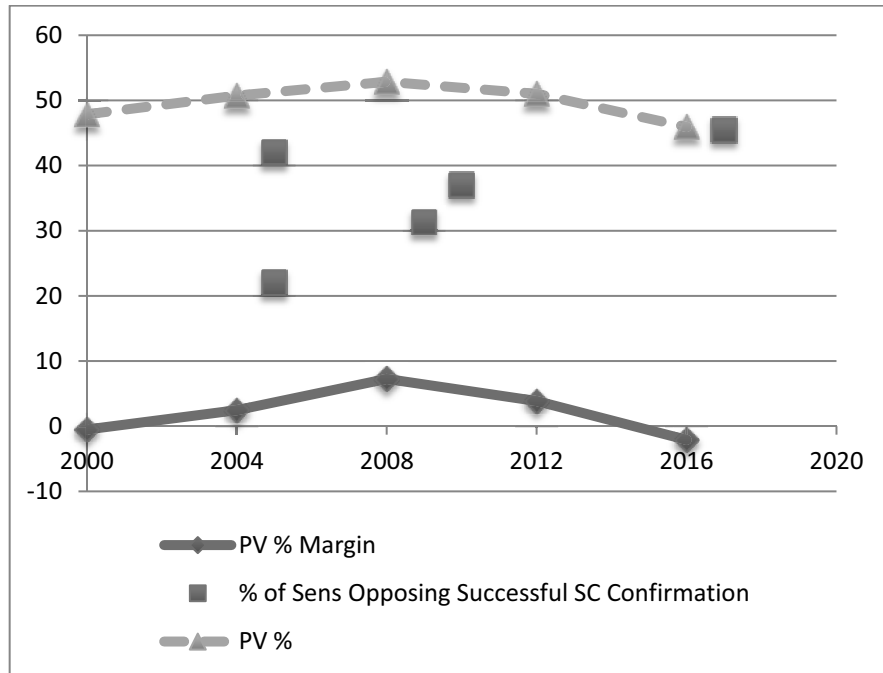


Chart 14: Presidential Popular Vote & Supreme Court Confirmations, Polarization Period



But in another sense, the confirmation process has reached a new stage of contentiousness. Since George W. Bush's nomination of Harriett Miers in 2005, every nominee has been contested in the Senate. Two appointees—Miers and Barack Obama's choice of Merrick Garland—have been withdrawn without the benefit of a Senate vote of any kind. And two are “minority Justices,” having secured confirmation with a majority of senators who had received fewer votes in their most recent elections than those in opposition (as displayed in Table 1).

IV. CONCLUSION: THE COURT'S LEGITIMACY IN THE ERA OF POLITICAL POLARIZATION

What does this reality mean for the legitimacy of the Court? Does it matter that three of the sitting Justices fit the label of “minority Justices”? Moreover, does it matter that the three—Clarence Thomas, Samuel Alito,

and Neil Gorsuch—are the three most conservative Justices on the Court?³⁸ After all, given that the Constitution apportions two senators to every state, it should not be surprising that close votes in the Senate produce skewed results with regard to the total of number of votes senators garnered in their most recent elections. For example, it is simply not possible for a senator from a state with the population size of Wyoming to come even close to winning the same number of votes to a senator from a thickly populated state like California. More importantly, the Framers constructed the Constitution with that knowledge in mind. Indeed, many pieces of legislation passed by a narrow margin in the Senate likely have been supported by a majority of senators who had won fewer votes in their most recent elections than those in opposition.

Of course, the case of legislation is different than judicial nominations. Legislation also requires approval from the popularly-apportioned House of Representatives. And if the vote is close, the President's signature (or acquiescence) is also required. The case of presidential appointments to the executive branch is perhaps a better comparison. With those confirmations votes, the Senate acts without the aid of the House. And again, these nominees may secure confirmation with a majority of senators who had won fewer votes than those in opposition. But, of course, there is a difference between successful nominees for the executive branch and those for the federal judiciary, especially Justices of the Supreme Court. The former serve at the pleasure of the President, and rarely stay for extended periods of time. Judicial nominations are in this sense distinct, lasting the lifetime of the nominee or when he or she decides to step down. Perhaps more significantly, they tend to stay on the bench for many years, even decades. For example, in the case of Supreme Court, the Justices appointed since 1969 who have completed their terms served nearly twenty-five years on average.

Given the activism of the Warren Court, one could argue that McCloskey's conclusions that the Court "seldom strayed very far from the mainstreams of American life and [has] seldom overestimated its own power resources"³⁹ ceased describing judicial decision-making soon after he wrote those words in 1960. But even so, the arrival of the concept of a "minority Justice" cast his conclusions in a different light, and adds another aspect to Graber's notion of the "non-majoritarian difficulty." Of course, only time will tell if this Court will "lag far behind or forge far ahead of

38. For ideological scores of the Justices, see Andrew D. Martin & Kevin M. Quinn, MARTIN-QUINN SCORES, [mqscores.berkeley.edu](https://perma.cc/7M5B-7C77) [https://perma.cc/7M5B-7C77]

39. MCCLOSKEY, *supra* note 3.

America”⁴⁰ in the near future, or if it will behave in accordance with McCloskey’s conclusions of 1960.

40. *Id.* at 224.